NO. 83-815

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN H. GRIMM, M.D., PAT McBRIDE, FRANK T. NAGLE, TRUSTEE, AND THE TAYLOR TRUST,
Petitioners,

v.

FRED RIZK, EDWARD RIZK, CARL GROMATZKY, AND FRANK F. DAVIS,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Texas Court of Appeals err in holding on the basis of the uncontroverted evidence before it that the summary judgment granted by the trial court against Petitioners and others should be affirmed on the ground that a prior final judgment in a previous suit was, under Texas law, *res judicata* of the claims asserted in this suit?

2. If so, is a Texas statute [article 3810, TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1981)] that provided an alternative basis for summary judgment in the trial court subject to constitutional attack in this Court, under the record in this case, where the constitutional claim was not presented to the trial court or the Court of Appeals and no record evidence or decided authority is cited to this Court by Petitioners in support of their attack upon it?

3. If so, is article 3810, TEX. REV. CIV. STAT. ANN. (Vernon Supp. 1981), on its face, in violation of the Constitution?

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Respondents Fred Rizk, Edward Rizk, Carl Gromatzky, and Frank F. Davis, in response to the petition for certiorari filed by John H. Grimm, Pat McBride, Frank Nagle, Trustee, and The Taylor Trust would show that the petition for certiorari should be dismissed or that certiorari should be denied.

JURISDICTION

This Court is without jurisdiction pursuant to the provisions of 28 U.S.C. § 1257(3) (1977) under which

Petitioners have attempted to invoke its jurisdiction. The validity of a state statute was not placed in issue before any of the courts below and is mentioned for the first time in the petition for certiorari. Thus, as noted at pages 10-11, *infra*, this Court has repeatedly held that it has no jurisdiction to consider the second question presented by Petitioners for review. The first question presented by Petitioners for review does not question the validity of a state statute, but questions the constitutional validity of the application of the doctrine of *res judicata*. In response, Respondents would show this Court that 28 U.S.C. § 1257(3) provides no jurisdiction in this Court over such a claim. Further, this claim, which was asserted for the first time in Petitioners' motion for rehearing of the denial of a discretionary writ in the Texas Supreme Court, was not properly presented to the courts below and preserved for their review. Finally, the constitutional question is insubstantial and of no colorable merit as noted at pages 8-9, *infra*. Thus, it cannot form the basis for jurisdiction in this Court. *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

STATEMENT OF THE CASE

Petitioners' statement of the case omits a number of uncontroverted elements in the record of proceedings in this case. Petitioners John Grimm, Pat McBride, Frank Nagle, Trustee, and The Taylor Trust, were four of the seven parties against whom a summary judgment was entered by the 151st Judicial District Court of Harris County, Texas, on September 28, 1981.[1]

1. The other three parties against whom summary judgment was entered, Janco, Inc., Plantation Ventures, Ltd., and Frank T. Nagle, Individually, did not perfect an appeal of the trial court judgment.

This suit, the second filed by Petitioners, alleged that Respondents (1) had failed to comply with the provisions of TEX. REV. CIV. STAT. ANN. art. 3810 (Vernon Supp. 1981) (hereinafter "article 3810"), which governs sales under a deed of trust, (2) improperly accelerated the payment of a second note secured by the deed of trust, (3) improperly foreclosed a lien on certain personal property, and (4) breached an alleged oral agreement with Petitioners not to foreclose. Respondents moved for summary judgment on the ground that these claims were all foreclosed by a prior final judgment entered on May 2, 1977, by the 129th Judicial District Court of Harris County, Texas, against William R. Upchurch, the admitted trustee, partner, and agent of each of the Petitioners. Further, Respondents presented evidence by affidavit and from the discovery taken in this suit to establish that each of the Petitioners' claims was, as a matter of law, without merit. Although shortly before the hearing on the motion for summary judgment, Petitioners filed a lengthy affidavit, no factual controversy was raised with respect to any material fact before the trial court. Summary judgment was granted by the trial court on September 28, 1981.

Petitioners perfected an appeal to the Texas Court of Civil Appeals at Houston asserting that the question of whether Respondents had complied with article 3810 presented a factual controversy that should not have been resolved by summary judgment. Petitioners also added three new claims that had not been previously presented to the trial court: (1) that Respondents failed to comply with their contractual obligation to one of the Petitioners, (2) that Respondents waived certain contractual rights, and (3) that Respondents were

estopped to assert rights given them under the deed of trust executed by one of the Petitioners. Respondents asserted in the Court of Appeals that the summary judgment should be affirmed on the ground that the earlier judgment by the 129th Judicial District Court was *res judicata* of the claims asserted by Petitioners, since it was uncontroverted that Petitioners were in privity with the plaintiff in that case. Therefore, under the doctrine of *res judicata,* all claims that were asserted or could have been asserted in the prior suit were barred. Further, Respondents urged under the record developed in this case that it was uncontroverted that summary judgment was proper under each of the other grounds submitted in Respondents' motion to the trial court. In reply, Petitioners urged that the earlier judgment by the 129th Judicial District Court was not a final judgment on the merits.

The Court of Appeals held that the prior final judgment of the 129th Judicial District Court was *res judicata* of the claims asserted in this suit by Petitioners and that, even if Petitioners had claims that had not been asserted in the first suit, those claims could have been asserted in the first suit and were therefore barred under the doctrine of *res judicata.* In light of this decision, the Court of Appeals did not find it necessary to consider Respondents' arguments concerning the other reasons why summary judgment was appropriate, including Respondents' position that they had fully complied with the provisions of article 3810.

A motion for rehearing filed by Petitioners was overruled by the Court of Civil Appeals and the Supreme Court of Texas refused to grant a discretionary writ to

review the Court of Civil Appeals' decision. Petitioners then filed a motion for rehearing in the Texas Supreme Court and, for the first time, urged that the application of the doctrine of *res judicata* in this case violated their right to due process of law. The motion for rehearing of the denial of the discretionary writ was denied by the Texas Supreme Court.

In their petition for certiorari, Petitioners renew the argument that application of the doctrine of *res judicata* is a violation of the Constitution of the United States and now assert for the first time that article 3810, TEX. REV. CIV. STAT. ANN., violates the United States Constitution.

REASONS FOR DENYING THE WRIT

1. Application of the Doctrine of *Res Judicata* Does Not Deny a Party Due Process of Law.

The holding of the Texas Court of Appeals was that the prior final judgment against William R. Upchurch by the 129th Judicial District Court from which no appeal was taken was *res judicata* of the claims asserted by Petitioners.[2] The Court of Appeals noted that the Petitioners had admitted that Upchurch acted as the trustee, partner, or agent for each of them and that Upchurch had no individual interest in the causes of action that

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2. The petition for certiorari argues that the 1977 judgment of the 129th Judicial District Court was not a final judgment, but was an order of dismissal without prejudice. The Texas Court of Appeals, applying Texas law, held to the contrary: "In this case, we hold that the claims of [Petitioners] are barred under the doctrine of *res judicata* by reason of a final take-nothing judgment on the merits in an earlier lawsuit. . . ." *Petitioners' Appendix*, at p. 9.

he asserted. The Court held that the final judgment entered against Upchurch Trustee constituted a judgment on the merits of the Petitioners' claims. Further, the Court of Appeals held that if Petitioners had other claims based upon the same set of factual circumstances, those same claims could have been presented in their prior suit and were, under Texas law, barred by the doctrine of *res judicata.* In applying these precepts to the uncontroverted facts before the Court, the Court of Civil Appeals followed a long line of Texas authority to the same effect. *See, e.g., Texas Water Rights Commission v. Crow Iron Works,* 582 S.W.2d 768, 771-72 (Tex. 1979); *Benson v. Wanda Petroleum Co.,* 468 S.W.2d 361, 363 (Tex. 1971); *Ogletree v. Crates,* 363 S.W.2d 431 (Tex. 1963).

The doctrine of *res judicata* as applied by the courts of Texas substantially mirrors the common law doctrine of *res judicata,* which appears to be almost universally recognized. *See, e.g.,* F. James, *Civil Procedure* § 11.9 (1965); *Developments in the Law—Res Judicata,* 65 HARV. L. REV. 818 (1952). This Court has previously had occasion to review and define the doctrine under the common law:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. . . . Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). *See also Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877). Since, by definition, the doctrine of *res judicata* is that a party has already had his day in court and cannot have a second, any notion that the application of the doctrine denies a party his right to due process of law is without basis. Naturally, Petitioners cite no authority in their petition to this Court to support that proposition.

A review of the history of this case demonstrates that Petitioners' real complaint is that they do not agree with the conclusion of the courts below that the uncontroverted facts establish that they were in privity with William R. Upchurch, the plaintiff in the 1977 suit or with the legal construction of the judgment entered in that case.[3] While Respondents have argued and the courts below have held that Petitioners are in error on both of these points, Respondents respectfully submit that this Court does not sit to resolve such questions concerning the presence of a fact issue in a particular case or the proper construction of a particular judgment under Texas law.

2. Petitioners' Belated Attack on the Constitutional Validity of Article 3810 is Simply Not a Part of This Case.

Petitioners, for the very first time in this case, argue in their petition for certiorari that article 3810 is

3. Petitioners' contention that the Upchurch judgment was not a judgment on the merits amounted to no more than a collateral attack on a prior final judgment. Texas law precludes such an attack. *El Paso Pipe & Supply Co. v. Mountain States Leasing, Inc.*, 617 S.W.2d 189 (Tex. 1981).

unconstitutional. This claim is not found in Petitioners' pleadings in the trial court, in its response to the motion for summary judgment, in its brief in the Court of Appeals, in its petition for writ of error to the Supreme Court of Texas, or in its motion for rehearing of that petition to the Supreme Court. Further, the decision of the Court of Appeals, as noted above, does not rest upon the validity of article 3810, but upon the applicability of the doctrine of *res judicata* to the claims asserted by Petitioners. This Court has repeatedly held that it has no jurisdiction to consider a constitutional attack upon a state statute that was never presented to the state courts to which a petition for certiorari is sought. For example, in *Beck v. Washington,* 369 U.S. 541 (1961), the court held that it had no jurisdiction to consider a constitutional challenge under the equal protection clause to a Washington State statute since the constitutional challenge had never been presented to the trial court, the Washington Court of Appeals, or the Washington Supreme Court. *Id.* at 553. Identical analysis is applicable here. Petitioners' due process challenge to article 3810 was never made to the trial court, the court of appeals, or the Texas Supreme Court. It is presented for the first time in the petition for certiorari and, accordingly, is a question not properly before this Court. *See also Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248 (1902).

Further, the question of the constitutional validity of article 3810 would be germane to this case only if it is assumed that (1) the Court of Appeals erroneously applied the doctrine of *res judicata,* (2) Respondents were

entitled to summary judgment on the basis of their alternative claim to the trial court that the uncontroverted evidence established that they had complied with article 3810, and (3) there were some demonstrable infirmity in article 3810 that was of constitutional significance that had been passed upon by the lower courts. In effect, Petitioners' claim that article 3810 is constitutionally infirm is a collateral attack on the final judgment entered in the earlier 1977 lawsuit in which the original judgment against Petitioners was entered and from which no appeal was perfected. Such a collateral attack originating in this Court is unprecedented to the knowledge of Respondents and Petitioners have cited no authority authorizing it in their petition for certiorari.

3. Article 3810, Tex. Rev. Civ. Stat. Ann., On Its Face, Comports With the Concept of Due Process of Law.

Article 3810, which is quoted in the Petition at pp. 9-11, authorizes a non-judicial foreclosure sale in Texas if certain statutory prerequisites are met. The statute provides for notice to the party owing the debt for which the property serves as security, both by posting of the notice in public places and the mailing of a written notice in a properly addressed envelope. Further, the sale is conducted not by an officer of the state or by any state official, but by an independent trustee selected by the parties by contractual agreement. Thus, on its face, there is no deprivation of private property by the action of the state without notice to the owner of the property that would raise any issue of due process of law.

Indeed, in cases in which a record has been developed and a constitutional attack made upon article 3810, the statute has been held to comply with the constitutions of both Texas and the United States. *See, e.g., Barrera v. Security Building and Investment Corp.*, 519 F.2d 1166, 1169-70 (5th Cir. 1975); *Armenta v. Nussbaum*, 519 S.W.2d 673, 677-79 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.). *See also Williamson v. Tucker*, 615 S.W.2d 881, 892 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). Thus, even if this were a case in which a party had properly presented the claim in the courts below, and these courts had ruled upon it, no substantial question concerning the constitutional validity of article 3810 would be legitimately presented for review.

CONCLUSION

For the foregoing reasons, Respondents Fred Rizk, Edward Rizk, Carl Gromatzky, and Frank F. Davis respectfully urge that the Petition for Writ of Certiorari filed in this cause by John H. Grimm, M.D., Pat McBride, Frank T. Nagle, Trustee, and The Taylor Trust be

dismissed or denied and that Respondents be awarded their costs.

Respectfully submitted,

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December 12, 1983

CERTIFICATE OF SERVICE

Pursuant to Sup. Ct. R. 28.5, I have served all parties required to be served with three copies of the foregoing Brief of Respondents in Opposition to Petition for Certiorari by placing the same in the United States mail, with first class postage prepaid and addressed to the following:

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Dated this December 9, 1983.

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